(3)

No. 90-98

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

GEORGE FRANKLIN, et al.,
Petitioners,

VS.

PEAT MARWICK MAIN & CO., et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEESAL, YOUNG & LOGAN
STEPHEN YOUNG
ROBERT D. FEIGHNER
(Counsel of Record)
BEN R. SUTER
Catalina Landing
310 Golden Shore
Long Beach, California 90801-1730
Telephone: (213) 436-9051

Counsel for Respondent
Prudential-Bache Securities Inc.

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Miscellaneous

No. 90-98

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

GEORGE FRANKLIN, et al.,
Petitioners,

VS.

PEAT MARWICK MAIN & CO., et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTORY STATEMENT

This brief in opposition to petition for writ of *certiorari* is filed on behalf of PRUDENTIAL-BACHE SECURITIES INC. ("Prudential-Bache"), a defendant and cross-complainant in the district court and an appellant in the Ninth Circuit proceedings. It is filed in opposition to the petition filed by GEORGE FRANKLIN, JON QUINT, ELLEN QUINT, STEFAN REZNIK, WILLIAM B. WEINBERGER, RICHARD LOWE, PAUL L. HOLMES and EVELYN S. HOLMES, plaintiffs in the

district court and appellees in the Ninth Circuit proceedings.

Petitioners, on behalf of themselves and a certified class consisting of persons other than defendants who purchased Kaypro Corporation stock during the class period, filed an action under the federal securities laws and common law against Kaypro Corporation, its officers and directors, Peat Marwick Main & Co. ("Peat Marwick"), its accountants, and Prudential-Bache, the lead underwriter for a 1983 offering of Kaypro common stock. The appeal below, as well as this petition, concerns the effect of petitioners' settlement with Kaypro and its officers and directors on non-settling defendants' statutory and contractual rights of contribution and indemnification.

Petitioners seek relief from this Court from the rule of proportionate liability for non-settling defendants set forth by the appellate court on the ground that it unfairly prejudices petitioners in their potential recovery in this action. The petition does not accurately reflect either the nature of settlement negotiations or the terms of the settlement agreement. Moreover, it seeks to obscure the fact that the rule fashioned by the appellate court places no greater burden upon petitioners than that which they contracted for in their settlement agreement.

II.

STATEMENT OF THE CASE

The petition asserts that after discovery and certification, settlement negotiations ensued between plaintiffs and Kaypro (together with its officers and directors). The petition then states that "Bache and Peat Marwick were

invited to join the settlement discussions but refused." (Petition, p. 4, first full paragraph.)

The record before the trial court proves otherwise. As Prudential-Bache advised the trial court in its memorandum of points and authorities in opposition to good faith order, the stipulation of settlement which was presented to that court was the fourth draft. Prudential-Bache had been included in the first three drafts as a "settling defendant." Between November 1986 and April 1987, petitioners, settling defendants and Prudential-Bache negotiated and revised three separate predecessor drafts of the stipulation of settlement. (E.R. 563:18-565:3.)

Because Prudential-Bache and plaintiffs could not agree upon final language concerning the effect of the settlement as to *all* settling defendants, petitioners unilaterally chose at the eleventh hour to execute the stipulation of settlement without Prudential-Bache. The record is undisputable (1) that Prudential-Bache was very much involved in settlement negotiations; and (2) that the first three drafts of the settlement agreement provided that Prudential-Bache would be dismissed from this action without paying a cent to petitioners in exchange for its agreement to relinquish its statutory and contractual rights to recover litigation expenses from Kaypro (which were at that time approximately $150,000). (E.R. 564:7-565:22.)

In their statement of the case before this Court, petitioners assert, without citation, that "Kaypro was on its way to bankruptcy [which occurred subsequent to the settlement at issue here], and its officers and directors did not have sufficient personal wealth to contribute significantly to a judgment in a case of this nature, involving claimed damages of over $25 million." (Petition, p. 4, second full paragraph.) Presumably, the risk of

a Kaypro bankruptcy, which appears nowhere in the record below and which was neither mentioned nor a factor in the district court's ruling below, is raised in an attempt to lend credence to petitioners' apparent concern about a shortfall in recovery which, under these facts, could not have occurred.

The reference to Kaypro's financial condition is inappropriate, because it is not based on the trial court record. Moreover, the reference is misleading. The settlement in this case was not funded by any of the individual defendants, including Kaypro, but rather came from two sources, a policy of insurance covering the officers and directors of Kaypro, and Kaypro's property insurer. (E.R. 562:1-571:14.) The policies of insurance were attached to the Suter declaration filed in opposition to the good faith hearing (Clerk's Record 116).

Kaypro's D&O insurer paid $8,925,000 on a $20,000,000 policy, while Kaypro's property insurer paid $325,000 on a $500,000 policy. The $9.25 million paid by Kaypro's insurers represented less than half of the policy limits available. The focus at the time of settlement was not upon a potential Kaypro bankruptcy, as the insurance coverage available could easily have funded a settlement twice the size of that reached between petitioners and settling defendants. Nor do the briefs below contain argument concerning the "wasting asset" (Petitioners' Brief, p. 4, second full paragraph) nature of the policy. The issue at the good faith hearing was not the solvency of the settling defendants, but rather whether their payment of $9.25 million was in the range of good faith for damages alleged to be $25 million arising largely from post-offering conduct by the settling defendants.

Perhaps the most glaring omission from petitioners' statement of the case is their failure to discuss the

contingent nature of the settlement agreement. While it is clear that petitioners and settling defendants sought to obtain a good faith bar (to extinguish all potential cross-claims for contribution and/or indemnity), and to provide non-settling defendants with a "judgment credit" (an offset based upon the amount paid by the settling defendants, without regard to settling defendants' proportionate fault), their settlement agreement in essence provided that

(1) any appeal of the good faith order would not affect the finality of the settlement or the payment of petitioners' attorney's fees; and

(2) upon a successful appeal by the non-settling defendants, the settlement would remain binding and would convert to a reduction in judgment settlement (providing non-settling defendants with a credit based upon the settling defendants' proportionate fault).

Specifically, the stipulation of settlement provided the following:

> Any appeal by the Non-Settling Defendants from either the Good Faith Order approving the partial settlement or the judgment extinguishing claims of the Non-Settling Defendants shall not affect the finality of the Settlement between the settling parties or the payment of the fees awarded to plaintiffs' counsel. *Upon a successful appeal by the Non-Settling Defendants, however, the Settlement as to the Plaintiff Class shall remain binding and shall convert to a reduction in judgment settlement.* The purpose and effect of such a judgment reduction settlement is to protect the Settling Defendants individually and collectively against any liability for any amount in